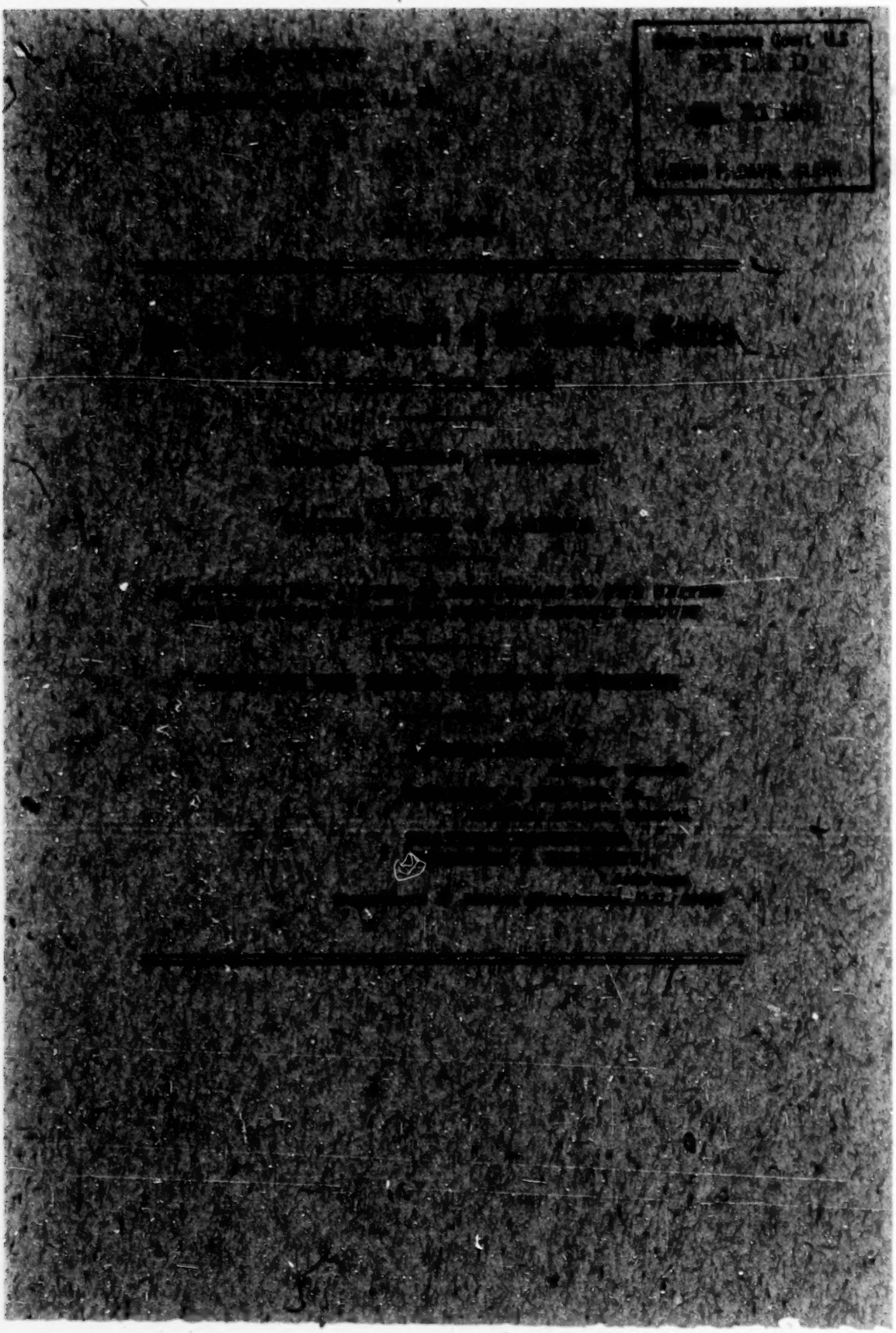

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 245

MILTON BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (II. 8, III. 6, Pet. App. 1a–3a)[1] are not reported.

JURISDICTION

The order of the court of appeals dismissing the first appeal was entered on May 29, 1963 (II. 4, 8). The order of the court of appeals dismissing the second appeal was entered on June 26, 1963 (III.

[1] The certified record is in three parts. The first volume consists of all papers and transcripts certified by the district court to the court of appeals and is referred to as "R". Volume II contains the proceedings in the court of appeals in the first appeal, referred to as "II". Volume III contains the proceedings in the court of appeals in the second appeal, referred to as "III".

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6.). The petition for a writ of certiorari was filed on June 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 35 provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37(a)(2) provides in pertinent part:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion * * *.

Rule 45 provides in pertinent part:

> (a) *Computation.* In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday * * *.
>
> (b) *Enlargement.* When an act is required or allowed to be done at or within a specified

> time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

Rule 56 provides:

> The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

QUESTIONS PRESENTED

1. Whether, when the last day for appeal of a federal conviction falls on Saturday, the fact that state offices close on Saturday requires the exclusion of Saturday in computing the time for appeal.

2. Whether, after an appeal from a conviction has been dismissed for untimeliness, a reduction in sentence revives the opportunity for appeal.

STATEMENT

On March 14, 1963, petitioner was convicted by a jury in the District Court for the Southern District of New York on two counts, one charging the knowing possession of 110 counterfeited $20 bills in vio-

lation of 18 U.S.C. 472, and the other charging the knowing receipt and concealment of five Series H Bonds in the total amount of $22,000 which had been stolen and transported in interstate commerce in violation of 18 U.S.C. 2315 (R. 621–622, 586).[2]

On Wednesday, April 24, 1963, with retained counsel present, petitioner was sentenced to two years' imprisonment on each count to run concurrently and fined a total of $2,000 (R. 597–605). Judgment was entered that day (R. 617).

On Monday, May 6, 1963, petitioner filed a notice of appeal which was dated April 30, 1963 (R. 706–709). The government moved to dismiss the appeal for want of jurisdiction because the notice of appeal was not filed within 10 days as required by Rule 37(a)(2) of the Federal Rules of Criminal Procedure (II. 1–3). The 10-day period expired on Saturday, May 4. An associate of trial counsel filed an opposing affidavit, claiming that the notice of appeal had been signed on May 2, 1963, and given to him on May 3, 1963, to file, but that he became ill and gave the papers to a secretary for someone else to handle. He stated that he was ill on Saturday and Sunday, May 4 and 5, and that trial counsel did not return to the office until May 6, 1963, when the notice was filed (II. 5–6). On May 28, 1963, the court of appeals granted the government's motion to dismiss (II. 4) and on May 29, 1963, an order of dismissal was filed (II. 8–9).

[2] Petitioner was found not guilty of a third count charging him with transporting the bonds in interstate commerce.

On May 31, 1963, petitioner filed a motion in the district court for reduction of sentences under Rule 35, F.R. Crim. P. and for other relief (R. 716–732). He noted that his appeal had been dismissed because it was "filed one business day too late" (R. 720, 729–730). On June 10, 1963, at a hearing on the motion to reduce sentence, counsel stated that the notice of appeal had been late because of conditions in counsel's office and that if the sentence were reduced this would revive his client's time to appeal (R. 609–610). In answer to an inquiry of the trial judge, petitioner's counsel assured the court that an immediate appeal would be prefected if the sentence were reduced (R. 614–615). The trial judge reduced petitioner's sentence from two years' imprisonment to one year and eight months' imprisonment on each count to be served concurrently and reduced the total fine from $2,000 to $1,500 (R. 616, 717). On June 10, 1963, judgment was so entered (R. 618).

On June 11, 1963, petitioner filed a second notice of appeal (R. 732–734). On June 12, 1963, the government filed a motion to dismiss the appeal, on the ground that a reduction of sentence does not revive the right to appeal (III 1–4). On June 26, 1963, the court of appeals dismissed the appeal on the government's motion (III 5–6).

ARGUMENT

1. With respect to the first appeal, petitioner claims that his notice of appeal, which was filed on Monday, should not be deemed untimely, because the 10-day period to appeal expired on Saturday, a day when

the offices of the clerks of New York State courts are closed. The federal courts are, however, open on Saturday (Rule 56, F.R. Crim. P.) and Rule 45(a) of the F.R. Crim. P. provides that "[i]n computing any period of time * * * [t]he last day of the period so computed is to be included, unless it is a Sunday or legal holiday." Since Saturday has not been declared to be a legal holiday by either the United States or New York State, the appeal was not timely and it was therefore necessarily dismissed. *United States* v. *Robinson*, 361 U.S. 220; see *United States* v. *Isabella*, 251 F. 2d 223 (C.A. 2).

2. The district judge's reduction of petitioner's sentence pursuant to his motion under Rule 35, F.R. Crim. P., did not revive the right to appeal. Rule 37(a)(2) provides that an appeal must be taken within ten days "after entry of the judgment or order appealed from." Although petitioner's second appeal was taken within ten days of the order reducing his sentence, petitioner does not appeal from that order, which he requested and as to which he assigns no error. Petitioner seeks, instead, to appeal from the original judgment of conviction, and an appeal from that judgment was plainly out of time when the second notice of appeal was filed. The trial judge had no power to afford petitioner a second chance to appeal through granting his request for a reduction of sentence. *United States* v. *Robinson*, 361 U.S. 220; Rule 45(b), F.R. Crim. P.[3]

[3] The only exceptions to Rule 37's provision that an appeal must be taken within ten days of the judgment appealed from are when a motion for new trial (Rule 33) or a motion for arrest of judgment (Rule 34) is made within the

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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ten-day period for appeal. If such a motion is denied, an appeal from the conviction may be taken within ten days after entry of the order denying the motion.

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